82-1059

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EUGENE R. EHMANN,

Petitioner,

—against—

WILLIAM H. WEBSTER
~~CLARENCE M. KELLEY~~, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION and EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Was the procedure afforded to the petitioner, including denial of an opportunity to present witnesses on his behalf, and to orally communicate with the ultimate decision maker, consistent with the Due Process Requirements of the Fifth Amendment to the Constitution of the United States, in light of the fact that petitioner was deprived of a recognized property interest.

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TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Eugene R. Ehmann, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For the District of Columbia Circuit entered in the above-entitled case on September 21, 1982.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, reported at Docket No. 81-2298 (D.C. Cir. 1982) is printed in Appendix A hereto, *infra,* page 1a. The Judgment of the United States District Court for the District of Columbia Circuit is printed in Appendix A, *infra,* page 4a.

JURISDICTION

The judgment of the United States Court of Appeals For the District of Columbia Circuit (Appendix A, *infra,* page 1a) was entered on September 21, 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner, a former tenured Special Agent with the Federal Bureau of Investigation (FBI) sought judicial review of his dismissal from employment for violations of various rules and regulations of the FBI. Petitioner worked regular daytime hours and had received a personal commendation from the Director for his work as well as an incentive award. In order to advance himself, petitioner enrolled for daytime classes at the University of Arizona and attended about twenty hours of classes. Petitioner then withdrew from his courses prior to reporting to his superiors. He reported the true and correct facts to his superiors who recommended that he be suspended for 30 days. Petitioner claimed that he checked with his office for messages during and between classes and kept up with his case load by working overtime. Petitioner raised mitigating circumstances, (i.e. a recent cancer operation as a cause of clouded judgment) during a conference with his supervisor.

Petitioner was fired by the FBI in July, 1975 and he appealed to then-Director of the FBI, Clarence Kelley and his discharge was upheld. Petitioner, in this appeal raised that his sole dereliction was commonplace among agents, *i.e.*, failure to submit in advance a request for supervisory approval that the time he was to spend out of service and on personal business be counted against accumulated leave. Petitioner was denied a hearing.

Petitioner contends that his dismissal was improper because (1) he was denied due process during the course of the disciplinary proceedings; (2) he was denied equal protection in that he was punished more severely than others guilty of similar misconduct, and (3) the decision to discharge him was arbitrary, capricious, and an abuse of discretion. Petitioner sought reinstatement with back pay. The parties cross-moved for summary judgment. On August 8, 1977, the District Court stayed its decision pending decision by the Court of Appeals in two then-pending cases. (*Ashton v. Civiletti,* 613 F.2d 923 (D.C. Cir. 1979) and *Wehner v. Levi,* 562 F.2d 1276 (D.C. Cir.

1977)). On November 9, 1981, Chief Judge William B. Bryant granted respondent's motion for summary judgment and denied petitioner's motion. Petitioner appealed to the Court of Appeals. The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court, finding that the opportunity accorded to petitioner by respondents to present his position comported with the requirements of due process and his discharge for serious misconduct was within the authority of the respondents.

REASONS FOR GRANTING THE WRIT

Petitioner was a permanent employee of the FBI. As such, he had a greater property interest in his job than did the "temporary indefinite" employee in *Ashton v. Civiletti,* 613 F.2d 923 (D.C. Cir. 1979). The Courts below recognized that petitioner had a property interest in his job. Yet, the sole "hearing" allowed petitioner was the submission of two letters, only one of which was addressed to the merits. That letter consisted of three handwritten pages, penned by petitioner without benefit of counsel and during his interrogation by his supervisors, Special Agents Besley and Long, on June 24, 1975.

The District Court below held that this cursory process was sufficient, relying upon *Gagnon v. Scarpelli,* 411 U.S. 778, 792 (1972). The Court of Appeals affirmed this holding; however, *Gagnon* dealt with parole revocation, and it is questionable whether it is applicable to the instant situation at all. *See also, Wehner v. Levi,* 562 F.2d 1276, 1278, fn. 7. More significantly, both *Wehner* and *Gagnon* predicate their acceptance of abbreviated due process on the total absence of "defenses or mitigating circumstances . . . which are in any sense 'complex or otherwise difficult to develop' " 562 F.2d at 1278.

The complaint sets out that petitioner was motivated, in major part, by his perceived requirement of rapid career advancement due to his recent serious operation for cancer. His "offense" was seeking to become more highly qualified, so as

to perform his job even more excellently than he had previously. Indeed, the respondents' own submissions show that in the last rating prior to the incident, petitioner had been evaluated an "Excellent" employee, whose "outstanding" work "was most instrumental in the over-all effectiveness" of his office. In the year preceding his termination, Special Agent Ehmann had been personally commended by the Director of the FBI, respondent Kelley, and received an incentive award.

These undisputed facts raise several complex and, indeed, exceedingly involved issues, including petitioner's motivation; his ability to be held accountable for his acts; whether he was the victim of a "handicapping condition" as defined in 29 CFR 1613.701 et seq. whose emotional condition (caused in part by his physical condition) required reasonable accomodation by the FBI. 29 CFR 1613.704. These are some of the issues that an administrative trier of fact must address in exercising discretion over punishment matters. Although petitioner did not have access to the Merit Systems Protection Board (MSPB), the expertise of that agency in defining the proper factors which must be taken into account in order that discipline not be merely arbitrary and capricious, cannot be doubted. See e.g. *Smithkline v. F.D.A.*, 587 F.2d (C.A.D.C. 1978).

In the seminal case of *Douglas v. Veterans Administration*, M.S.P.B. Docket No. ATO75299006 (April 10, 1981) and its progeny, the Merit Systems Protection Board identified twelve factors which ought to be developed and considered in discipline cases. In *Ruzak v. General Services Administration*, M.S.P.B. Docket No. SLO75209017 (August 20, 1981) M.S.P.B. held that the existence of a handicapping condition had to be considered in all adverse actions. While the F.B.I. was not before the M.S.P.B., it does recognize the authority of that body with regard to F.B.I. employees who have veterans status. See *Luis Rivera v. F.B.I.*, M.S.P.B. Docket No. NYO7528110255 (Initial Decision, September 17, 1981). It is elementary that the F.B.I., even if not required to satisfy the M.S.P.B., must afford petitioner a *meaningful* opportunity to present mitigating circumstances. In petitioner's case, such

circumstances could only be shown by presentation of medical testimony, and by the opportunity for petitioner to articulate his motivation at greater length than a three page letter submitted during the stress of a high-pressure interrogation. The inadequacy of the procedure afforded petitioner is quite obvious.

Under the Federal Rules of Civil Procedure, summary judgment is appropriate only where "there is no genuine issue as to any material fact." Federal Rules of Civil Procedure p. 56(c). It has been held that cases in which the underlying issue is one of motive or intent are particularly inappropriate for summary judgment. See *Egger v. Phillips,* 699 F.2d 497 (7th Cir. 1982), *citing Baldwin v. Local Union No. 1095,* 581 F.2d 145, 151 (7th Cir. 1978). The Seventh Circuit stated in *Egger, supra,* that "(a) determination involving a person's state of mind is seldom susceptible to direct proof, but must be inferred from circumstancial evidence." The court went on to state that,

> If improper motive can reasonably be inferred from evidence properly before the court, affidavits denying such motivation do not entitle a defendant to summary judgment. *Eggers v. Phillips,* 699 F.2d 497.

Analysis of internal memorandum of the FBI prior to the dismissal of petitioner reveals a final decision inconsistent and sharply at odds with all prior recommendations as to this employee.

At the time of his removal from his position, petitioner was assigned to the Tuscon Resident Agency of the FBI. The AIRTEL from S.A.C., Phoenix to the Director, Federal Bureau of Investigation, dated June 25, 1975 concerning Special Agent Ehmann contained a synopsis of the alleged misconduct as well as petitioner's general excellent performance rating throughout his career with the Bureau. Special Agent-in-Charge Long (hereinafter referred to as S.A.C.) then recommended that:

> After review of the entire matter and due to the gravity of this situation, I recommend that S.A. Ehmann be cen-

> sured, placed on probation, transferred out of the Phoenix Division, and suspended from duty.

Nowhere was the ultimate act of dismissal mentioned or apparently contemplated by S.A.C. Long. Based upon the foregoing the award of summary judgment to respondents was improper.

Due to the inadequacy of the procedures at the agency level it is impossible to determine whether the penalty of dismissal was procedurally proper according to the FBI's own regulations, which themselves are a property and legitimate expectation. See *Kizas v. Webster,* 492 F.Supp. 1135 (D.D.C. 1980). In an adverse action situation, petitioner had a right to have the FBI abide by its own internal laws. *Daub v. U.S.,* 292 F.2d 895 (1961); *Cuiffo v. U.S.,* 137 F.Supp. 944 (1955). He had a right to view the draft materials revealing the presiding official's decision process. *Harvin v. U.S.,* ____ Ct. Cl. ____ (Mo. 167-80C, September 23, 1981). In the absence of this material, the Court below erred in granting Summary Judgment to the agency. Rather, where substantial questions are not resolved by the Agency's disciplinary process (or, more correctly, by the Agency's refusal to permit due process into its infliction of discipline) the proper procedure is for the District Court to develop the record itself. See *Porter v. Califano,* 592 F.2d 770, 778 (5th Cir. 1979). This is especially true when, as at bar, an employee raises constitutional issues. In such areas, the agency is not to be deferred to, and the Court is the arbiter *de novo. Porter v. Califano, supra* at 780-84. Significantly, in *Porter* the agency made *some* attempt to ascertain the truth of the employee's claimed defenses. In the instant case, the courts below failed to conduct a *de novo* review, thus depriving petitioner of his procedural due process.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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